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No. 32

In the Supreme Court of the United States

October Term, 1931.

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT OF PETITIONER.

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vs.

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT OF PETITIONER.

May It Please the Court:

This case presents error on writ of *certiorari* to the United States Circuit Court of Appeals, Tenth Circuit, *certiorari* having been granted by this court in cause No. 790, October term, 1930, on April 20, 1931 (R. 62), 51 Sup. Ct. Rep. 488, ... U. S. ...

The Circuit Court of Appeals, Tenth Circuit, on January 20, 1931 (R. 51-60), by a divided court, 47 Fed. (2) 28,

affirmed a judgment against petitioner theretofore rendered in the cause by the United States District Court, Western District of Oklahoma (R. 60), which court assumed jurisdiction of the case on removal from a state court of the State of Oklahoma.

Statement of Case and Abstract of Record.

It will not be necessary to set out either the pleadings or the record in the trial court herein in full, but only the pertinent facts which are practically agreed upon.

This action was originally filed in the District Court of Oklahoma County, State of Oklahoma, by petitioner as plaintiff. Later an amended petition was filed in the case (R. 2-8).

The respondents, who were the defendants in the case, by joint petition for removal (R. 9-23), which petition was based on the ground of diversity of citizenship, removed said cause to the United States District Court, Western District of Oklahoma.

Petitioner by written verified motion sought to remand the case to the state court (R. 24-26). A verified response to the motion to remand was filed (R. 27-32).

Petitioner's suit was an action for damages under the statutory law of the State of Oklahoma on account of the wrongful death of one, Archie Lee Smith, an employee, who was injured on account of the alleged negligence of the defendants, their servants, agents and employees, on May 24, 1927, and which injuries caused his death the following day.

Two causes of action are set out in the petition. The first being for the sum of $100,000.00 damages *for the use and benefit of the next of kin of said deceased*, who were as follows, to-wit:

Lillian Smith, widow,
Donna G. Smith, minor daughter,
Welford Smith, minor son.

All of said next of kin being residents and citizens of the State of Oklahoma.

The second cause of action set out was for $3,000.00 damages for the pain and suffering which the deceased underwent from the time he was injured until he died, *and was for the use and benefit of the estate of said deceased.*

It is admitted that petitioner at the time of the filing of the case in the state court was the duly appointed, qualified and acting administrator of the estate of the deceased, having been duly appointed as such by the honorable County Court of Pawnee County, State of Oklahoma, before the suit was instituted, and on December 10, 1928, the court having jurisdiction to make said appointment, and was appointed at the written request of the surviving widow of said deceased, Lillian Smith, who had previously been the personal representative of her deceased husband's estate, but who on the last mentioned date before petitioner was appointed administrator of said estate, resigned in writing.

The defendants by their petition for removal and at the hearing on the motion to remand claimed that the resignation by the widow and the appointment of petitioner as administrator of said estate was a device and scheme, and

constituted a fraud on the part of the said widow and her counsel to deprive the federal court of jurisdiction in this case on removal, and the defendants set out in said removal petition the fact that some four other lawsuits had been filed by the widow as administratrix seeking to recover on the first cause of action set out in petitioner's amended petition, which actions had all been removed to the federal court and dismissed by the plaintiff therein prior to the institution of the present suit, but it was agreed that none of the four cases had contained a cause of action the same or similar to the second cause of action set out in petitioner's petition.

The defendants to further substantiate their petition for removal and on the hearing of petitioner's motion to remand, showed that the petitioner had consented to act as administrator of the estate of said deceased at the request of counsel for Mrs. Smith, the widow of said deceased. That he signed some papers, which consisted of an oath as administrator, a power of attorney in favor of Mrs. Smith, and that he signed an instrument appointing Mrs. Smith as his agent in Oklahoma as provided by the probate code of that state. The petitioner further stated that he did not sign a petition for his appointment as administrator and did not remember signing the bond, and it was admitted that he did not sign either instrument, but that his name was signed to the petition and bond by counsel, however, on December 26, 1928, he signed his oath, which was after the bond and petition had been signed and filed, and after petitioner had been appointed administrator of said estate.

That petitioner had no information about the estate and that he did not at any time enter into any agreement with counsel to procure his appointment as administrator, or to file the present action, and that he did not advance or provide any cost deposit. That he was not related to or acquainted with the widow of the deceased, and that the deceased left no estate in the State of Louisiana as far as he knew. That he did not have any contract for any fees or expect any fee for his acting as administrator.

The defendants at no time charged that the attorneys for petitioner were without authority to file and prosecute the present action, and whenever the time comes that the attorneys representing petitioner are required to show their authority so to do, it will be shown.

The petitioner at all stages in this case has contended that all of the claims and assertions of the defendants were immaterial, and constituted a collateral attack upon the judgment of the County Court of Pawnee County, Oklahoma, appointing petitioner administrator of the estate of said deceased, and contended that the acts set out in the defendants' joint petition for a removal with reference to the appointment of petitioner as administrator did not constitute any fraud upon the rights of the defendants, the court or anyone else, and that the resignation of the widow as administratrix of her deceased husband's estate and the appointment of petitioner were within the exclusive jurisdiction of the County Court or Probate Court of Pawnee County, State of Oklahoma, and was legal and authorized by the probate code of the State of Oklahoma.

It was agreed by the parties to the record at all stages of the proceedings in the United States District Court, Western District of Oklahoma, that petitioner, administrator and the defendant, Fitzsimmons Drilling Company, Inc., a corporation, were bona fide residents and citizens of the same state, to-wit, the State of Louisiana, and that the defendant, Atlantic Oil Producing Company, a corporation, was a bona fide resident and citizen of the State of Delaware.

Petitioner's motion to remand was denied by the court (R. 32). The defendants then filed their separate answers, which are identical (R. 33-39), and contained the following defenses:

1. A general denial.
2. Plea of contributory negligence.
3. Assumption of risk by the deceased.

The affirmative defenses of the separate answers were denied by petitioner's reply (R. 39).

On December 18th, 1929, the case was regularly tried before the Honorable T. Blake Kennedy, assigned district judge, and a jury. Immediately after the jury was impanelled, petitioner renewed his motion to remand to the state court, which was denied and an exception allowed.

Petitioner then introduced his evidence and rested, and again moved the court to remand said cause to the state court for lack of jurisdiction, which motion was denied, and petitioner excepted thereto. The defendants thereupon separately demurred to the petitioner's evidence, the court

sustained the same, dismissed petitioner's action and rendered judgment for the defendants which was excepted to by the petitioner and an exception allowed.

The court's judgment is found at record, page 39. Petitioner took the necessary and proper proceedings to appeal from the judgment to the Circuit Court of Appeals for the Tenth Circuit, and the appeal was duly lodged in that court.

As heretofore stated, the judgment was affirmed. A petition for a rehearing was filed and denied (R. 60).

Petition for *certiorari* to this court was granted and the case has been properly docketed for decision.

ASSIGNMENT of ERROR.

The sole question involved by this appeal is the jurisdiction of the trial court to do anything in the case except to remand the same to the state court from whence it was removed because of lack of jurisdiction of the parties to the record, on account of the petitioner and one of the defendants being residents and citizens of the same state, to-wit, the State of Louisiana.

ARGUMENT and AUTHORITIES.

The death statutes of the State of Oklahoma are very similar to the Federal Employer's Liability Act where death does not result immediately. Statutes on survival of actions necessary to be considered are sections 822, 823, 824 and 825 of the Comp. Okla. Stats. 1921, and are in words and figures as follows, to-wit:

"822. *Actions That Survive.* In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.

"823. *Actions Which Abate on Defendant's Death.* No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant.

"824. *Action for Death by Wrongful Act.* When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

"825. *Same—Who May Sue.* In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

These statutes have been construed a number of times by the highest state court of the State of Oklahoma. The identical statutes from an earlier code of the state are construed in the case of *St. Louis & S. F. R. Co. v. Goode*, 42 Okl. 784, 142 Pac. 1185.

The first, second and third paragraphs of the syllabus of that case are as follows:

"The right of action of a person injured through the wrongful act of another, to recover the damages sustained thereby, existed at common law, but abated upon the death of such injured person. This common law right of action survives, and is thus preserved, in the personal representative of decedent, by the terms of sections 5943, 5944, Comp. Laws 1909, and the cause of action and its survival are quite independent of sections 5945, 5946, Comp. Laws 1909, relating to the recovery of damages for the benefit of certain beneficiary therein named. And such action may be prosecuted to final judgment by the administrator, notwithstanding that death resulted from such injuries.

"The damages recoverable in such action, when revived, are only such as were sustained by the injured person in his lifetime (such as accrued in the period between the injury and his death), and when recovered are assets of his estate, and are not for the benefit of

the widow and next of kin, except as they may take as heirs upon the final distribution of the estate.

"Sections 5945, 5946, Comp. Laws 1909 (sections 5281, 5282, Rev. Laws 1910), create a new cause of action, to be prosecuted for the exclusive benefit of the beneficiaries named therein; the damages recovered in such suit do not become assets of decedent's estate. Such action is not dependent upon any common law right, and the right to maintain same is independent of sections 5943, 5944, Comp. Laws 1909. Nor will a recovery under these sections for the benefit of the widow and next of kin bar a recovery for the benefit of the estate of decedent, on account of the suffering and loss the decedent sustained through the injuries wrongfully inflicted on him, where death was not instantaneous."

In the case of *Smith* v. *Chicago, R. I. & P. Ry. Co.*, 42 Okl. 577, 142 Pac. 398, the court laid down the rule in the sixth paragraph of the syllabus as follows:

"Under section 5281, Rev. Laws 1910, damages recovered must inure to the exclusive benefit of the widow and children, but such widow and children, suing in such capacity for the pecuniary loss sustained by them in the death of the husband and father, cannot recover for mental anguish and suffering, because whatever may be recovered for mental anguish and suffering belongs to the estate of deceased and not exclusively to the widow and children, and should be recovered in a separate action."

Where an administrator has been appointed he is the only person that can prosecute either action given by the survival statutes, and in order for the widow to maintain the action for damages for wrongful death, she must plead

and prove that no personal representative has been appointed.

This rule was laid down in the case of *Sanders, et al., v. Chicago, R. I. & P. Ry. Co.*, 66 Okl. 313, 169 Pac. 891, wherein the court said:

> "Under sections 5281 and 5282, Revised Laws 1910, an action for damages for wrongful death may be brought by the widow or by the next of kin where there is no personal representative, and in such action it is necessary to plead and prove that no personal representative is or has been appointed.
>
> "Where the evidence in such an action fails to establish that no personal representative is or has been appointed, a demurrer thereto was properly sustained."

The foregoing statutes have been construed a number of times by the Supreme Court since the advent of statehood, but the holdings are consistent and we will not further burden the court with citations of authority.

Under the foregoing sections an administrator suing for damages for wrongful death is never a naked trustee or mere nominal party, as contended for by the defendants and as held by the Circuit Court of Appeals in this case, in the majority opinion.

We think this is clear from the holding the Supreme Court in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, wherein the court says:

> "Under section 824, Compiled Oklahoma Statutes 1921, it is the duty of the administrator of the estate of a deceased person whose death was produced by the

wrongful act of another to maintain a suit against such tortfeasor when necessary to recover for the benefit of the next of kin the damages which they have thereby sustained and to collect, receive, and distribute such moneys in proper proportion to the *cestui que trusts*. This section does not create a new office, but adds new duties to an old office, and for a dereliction in the performance of the duties thereof the administrator and the sureties on his official bond as administrator are liable."

Petitioner was entitled to join his first and second causes of action in the same petition under sections 266 and 267, Comp. Laws of the State of Oklahoma for the year 1921 relating to pleadings, which are in words and figures as follows, to-wit:

"266. *Joinder of Causes of Action.* The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of any one of the following classes:

"*First.* The same transaction, or transactions, connected with the same subject of action.

"*Second.* Contracts, express or implied.

"*Third.* Injuries, with or without force, to person and property, or either.

"*Fourth.* Injuries to character.

"*Fifth.* Claims to recover the possession of personal property, with or without damages for the withholding thereof.

"*Sixth.* Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

"*Seventh.* Claims against a trustee, by virtue of a contract, or by operation of law.

"But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

"267. *Causes of Action to Be Numbered.* Where the petition contains more than one cause of action, each shall be separately stated and numbered."

Petitioner was also entitled to bring this action on his two causes of action in his own name without joining any other persons under sections 209 and 211, Comp. Okla. Stat. 1921, with reference to parties, which provide as follows:

"209. *Plaintiff to Be Party in Interest.* Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract."

"211. *Plaintiffs Not Personally Interested.* An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

A case directly in point construing the identical statutes as above with reference to parties which is in force and effect in the State of Michigan is the case of *City of Detroit, Michigan*, v. *Blanchfield*, decided by the Circuit Court of

Appeals for the Sixth Circuit, and reported in 13 Fed. (2d) 13.

The first paragraph of the syllabus of this case is as follows:

> "Under Judicature Act, Mich. (Pub. Acts 1915, No. 314), c. 12, par. 12, providing that a guardian may maintain an action in his own name without joining his ward, for whose benefit it is brought, it is the citizenship of the guardian and not of the ward on which the jurisdiction of a federal court depends."

This is a guardianship case. Of course, there would be no difference in a case prosecuted by an administrator as the words, administrator or executor, are used alongside the word "guardian" in the last quoted statutes. There could be no difference. And it will be observed that the Oklahoma statutes and the Michigan statutes are identical.

In the opinion the court said:

> "It is insisted that a federal court has no jurisdiction, for the reason that Marion Killackey, the minor, in whose interest the suit is brought, is a resident of the State of Michigan, and that, where the jurisdiction of a federal court depends upon a diversity of citizenship, the residence of the ward, and not of the guardian, controls.
>
> "Section 2 of chapter 12 of the Judicature Act of 1915 of the State of Michigan (Pub. Acts 1915, No. 314), provides that 'every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by a statute, may sue in his own name with-

out joining with him the party for whose benefit the action is brought.'

"It was held by the Supreme Court of the United States in *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 436, 23 S. Ct. 211, 47 L. ed. 243, that, where a guardian in the state of the forum has the legal right to bring suit in his own name, it is his citizenship, and not the citizenship of the ward, upon which the jurisdiction of the federal court depends. This is the latest decision of the Supreme Court to which our attention has been called, and is necessarily controlling. To the same effect is the decision of the Second Circuit Court of Appeals in *New York Evening Post Co.* v. *Chaloner*, 265 F. 204, 213. The opinion in *Toledo Traction Co.* v. *Cameron*, 137 F. 48, 69 C. C. A. 28, was apparently written without reference to the *Mexican Central Ry. Co.* case, then recently decided."

The foregoing case follows a leading case by this court, that of *Mexican Central R. Co.* v. *Eckman, Gdn.*, 187 U. S. 429, 23 S. Ct. Rep. 211, 47 L. ed. 245, wherein the court lays down the following rule:

"The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name."

We think under the Oklahoma statutes, *supra*, with reference to parties, the two foregoing cases are absolutely conclusive in this case; however, both of them are guardian cases, and we now desire to call to the court's attention some cases involving the proposition where an administrator is a party to the record.

A late case from this court is the case of *Memphis Street Railway Company* v. *Moore*, 243 U. S. 299, 37 Sup. Ct. Rep. 273. The opinion is by Justice CLARKE, and it is said:

> "The requisite diversity of citizenship to sustain federal jurisdiction must be deemed to exist where a citizen of Arkansas, in his representative capacity as administrator, under appointment by a probate court of Tennessee, sues a Tennessee corporation for wrongfully causing the death of his decedent, although by Tenn. Acts. 1903, Chap. 501, it is provided that 'whenever a nonresident of the State of Tennessee qualifies in this state as the executor or administrator of a person dying or leaving assets or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state,' in view of the declaration of the highest state court that the only purpose of this act is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in the act."

An opinion was also written in this case in the Circuit Court of Appeals for the Sixth Circuit, 232 Fed. 709, and Judge SESSIONS in his opinion says:

> "It is settled that the jurisdiction of the federal courts depends upon the personal citizenship of the parties to the record, and not upon the citizenship of the parties whom they represent. *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Amory* v. *Amory*, 95 U. S. 186, 24 L. ed. 428; *Mexican Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. ed. 245; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *C. H. & D. R. Co.* v. *Thiebaud*, (C. C. A. 6) 114 Fed. 918,

922, 52 C. C. A. 538; *Bishop* v. *B. & M. R. R.*, (C. C.) 117 Fed. 771."

The Circuit Court of Appeals for the Sixth Circuit in the year 1900 construed the death statute of the State of Indiana, which is almost identical with the Oklahoma death statute set out herein, in exactly the opposite way to which the Tenth Circuit construes the Oklahoma statutes in the case at bar.

The case to which we refer is the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud*, 114 Fed. 918. The fourth paragraph of the syllabus of that case is as follows:

"The statute of Indiana (Burns' Rev. St. 1894, Par. 285) gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to 'the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.' *Held, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered, and thus his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.*"

In the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465, it is said:

"Under Rev. St. Ohio, Sec. 6135, authorizing an action for death by wrongful act to be brought by the

administrator for the benefit of the next of kin the administrator is not a nominal party merely, but is the real party, and has control of, and is responsible for, the conduct of the case; and consequently, if a foreign administrator, he may bring the action in the federal court, although the beneficiaries reside in the state where the death occurred."

In the opinion the distinction between the principle we contend for and the rule laid down by the majority opinion in this case is clearly distinguished.

There are a number of respectable authorities supporting our position on this matter. We will not discuss them, but will merely give the court the citations:

Childress v. *Emory*, (Tenn., 1823) 8 Wheat. 642, 669, 5 L. ed. 705;

Rice v. *Houston*, (Tenn., 1871) 13 Wall. 66, 67, 20 L. ed. 484;

Blake v. *McKim*, (Mass., 1880) 103 U. S. 336, 26 L. ed. 563;

Dodge v. *Perkins*, (C. C. Mass., 1827) Fed. Cas. No. 3954;

Carter v. *Treadwell*, (C. C. N. H., 1843) Fed. Cas. No. 2480;

Hartman v. *Fishbeck*, (C. C. Wis., 1883) 18 Fed. 291;

McElmurray v. *Loomis*, (C. C. Ga., 1887) 31 Fed. 395;

Bangs v. *Loveridge*, (C. C. N. J., 1894) 60 Fed. 963;

Wilson v. *Hastings Lumber Co.*, (C. C. N. H., 1900) 103 Fed. 801;

McDuffie v. *Montgomery*, (C. C. Ill., 1904) 128 Fed. 105;

Lemon's Admr v. *Louisville & N. R. Co.*, (Ky., 1910) 125 S. W. 701;

Hill v. *Henderson*, (1846) 14 Miss. (6 Smedes. & M.) 351;

Geyer v. *John Hancock Mut. Life Ins. Co.*, (1871) 50 N. H. 224, 9 Am. Rep. 185;

Miller v. *Sunde*, (1890) 1 N. D. 1, 44 N. W. 301;

Middleton's Ex'rs v. *Middleton*, (Pa., 1878) 7 Wkly. Notes Cas. 144;

Susquehanna, etc., R. Co. v. *Blatchford*, (Pa., 1871) 11 Wall. 172, 20 L. ed. 179;

Bondurant v. *Watson*, (La., 1881) 103 U. S. 281, 26 L. ed. 447;

American Bible Soc. v. *Price*, (Ill., 1884) 110 U. S. 61, 3 S. Ct. 440, 28 L. ed. 70;

Hess v. *Reynolds*, (Mich., 1885) 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927;

Continental Ins. Co. v. *Rhoads*, (Pa., 1886) 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380;

Dodge v. *Perkins*, (C. C. Mass., 1827) 4 Mason 435, 7 Fed. Cas. No. 3954;

Cooke v. *Seligman*, (C. C. N. Y., 1880) 7 Fed. 263;

Whitman v. *Hubbell*, (C. C. Iowa, 1887) 30 F. 81;

Brisenden v. *Chamberlain*, (C. C. S. C., 1892) 53 Fed. 307;

Wilson v. *Smith*, (C. C. Pa., 1895) 66 Fed. 81;

Laubscher v. *Fay*, (D. C. Ohio, 1912) 197 Fed. 879;

Harper v. *Norfolk & W. R. Co.*, (C. C. Va., 1887) 36 Fed. 102;

Bishop v. *Boston & M. R. R.*, (C. C. Mass., 1902) 117 Fed. 771;

Holmes v. *Oregon & C. R. Co.*, (D. C. Or., 1880) 5 Fed. 75;

Patch v. *Wabash R. Co.*, (Ill., 1907) 207 U. S. 277, 28 S. Ct. 80, 52 L. ed. 204;

Neel v. *Pennsylvania Co.*, (Ohio, 1895) 157 U. S. 153, 15 S. Ct. 589, 39 L. ed. 654;

Amory v. *Amory*, (N. Y., 1877) 95 U. S. 186, 24 L. ed. 428.

We think the foregoing authorities are conclusive of the proposition that an administrator is not a nominal party plaintiff in a suit brought to recover damages for a wrongful death in the State of Oklahoma, however, we desire to enumerate some of the duties of an administrator seeking to recover damages on a wrongful death claim.

"*1st.* The administrator must either settle the claim for damages for wrongful death or institute an action in a court of competent jurisdiction to recover thereon.

"*2nd.* The contract of settlement, or the plaintiff in the cause of action if a suit is instituted, must run in the name of the administrator.

"*3rd.* The administrator at the time he is appointed must give a bond and take an oath, faithfully to discharge his duties. He is an officer of the court appointing him the same as a federal receiver.

"*4th.* If a settlement of a cause of action for death is consummated without a suit the administrator must properly distribute the fund received in settlement to the proper parties designated by the statute to receive the money, or if the administrator files an action to recover on the claim and does not happen to be an attorney himself, he must select an attorney, and it is his

duty to select a competent one to file and prosecute the action in a court of competent jurisdiction.

"*5th.* If the suit is filed in the name of the administrator, who is not a mere nominal party as we contend, then he must either negotiate for a settlement of the claim or make arrangements to secure witnesses and properly prepare the case for trial.

"*6th.* At the time the suit is instituted to recover damages for the wrongful death, the administrator must arrange to make a cash deposit for the costs, or execute a bond in lieu thereof, and he is absolutely liable for the costs in the case in the event it is not prosecuted to a successful determination in his favor.

"*7th.* If a recovery is had in the case so instituted by the administrator for damages for wrongful death and any money is paid in satisfaction of the judgment rendered either on the merits or an agreed judgment, it is then the duty of the administrator to pay his lawyer, and distribute the balance to the next of kin, and if any of the next of kin happen to be minors, it is the administrator's duty to see that a proper guardian is appointed and the money paid to the guardian so that the interests of the minors, who are next of kin, will be properly protected.

"*8th.* If the administrator fails to perform the foregoing duties, or any other, he and his bondsmen are liable on his official bond."

In view of the duties of an administrator in the handling of a claim for damages for wrongful death, only a few of which have been set out above, can it be said that an administrator is a mere nominal party?

Opinion of the Circuit Court of Appeals.

The dissenting opinion of Judge COTTERAL in the case at bar in our judgment lays down the correct rules and principles of law that should be applied in this case. We do not, however, agree with the majority opinion, and desire to discuss the propositions decided therein in this brief.

Cases Cited in Majority Opinion Not in Point, and Do Not Support Conclusions Reached.

The majority opinion cites the cases of *Stewart* v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 455; *Maryland* v. *Baldwin*, 112 U. S. 490, and a number of other cases as supporting the proposition, that the residence and citizenship of the beneficiaries or next of kin should control on the question of jurisdiction in place and instead of that of the administrator; however, a close examination of these cases shows that they are not in point, as they are all cases where a state or some officer thereof, or a United States marshal or sheriff brings a suit for the benefit of some third person, and in that kind of a case it is held that the residence and citizenship of the party for whose benefit the suit is brought governs in determining the jurisdiction of a federal court on the ground of diversity of citizenship, and the name of the mere nominal or formal party will be disregarded. That is not the situation in this case, as has been clearly pointed out by the Supreme Court of the United States in at least two opinions, the first of which is *New Orleans* v. *Gaines*, 138 U. S. 595, 606, *sub. nom. New Orleans* v. *Whitney*, 34 L. ed. 1102,

1106, 11 Sup. Ct. Rep. 428, 431. Mr. Justice BRADLEY clearly points out the distinction between the cases cited in the opinion in the case at bar and the principle we herein contend for in the following language:

> "The most that can be said is that the subrogated creditor, by operation of law, represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle.
>
> "When, however, the state or the governor of a state is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship. Spear, Fed. Jud. 150, 152, and cases there cited; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Browne* v. *Strode*, 5 Cranch. 303; *Irvine* v. *Lowry*, 14 Pet. 293; *McNutt* v. *Bland*, 2 How. 9; *Huff* v. *Hutchinson*, 14 How. 586."

This case is cited with approval by Mr. Chief Justice FULLER in the case of *Mexican Central R. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. Rep. 211. This case was decided on January 5, 1903, and is later in the point of time than any of the cases cited under the first proposition by the majority opinion.

In the course of the opinion Chief Justice FULLER said:

"It is true that where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines*, by Mr. Justice BRADLEY, 'we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law'."

Perhaps the best distinction of the two classes of cases is set out by an opinion by Circuit Judge ROGERS in a later case decided in 1920 by the Circuit Court of Appeals for the Second Circuit. In this case the distinction between the two classes of cases is reviewed for more than the last one hundred years.

The case which we have in mind is *New York Evening Post Co.* v. *Chaloner*, reported in the 265 Fed. 204. In this case, it is said:

"The Supreme Court has repeatedly held that representatives stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. *New Orleans* v. *Gaines' Administrator*, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. ed. 1102; *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 434, 23 Sup. Ct. 211, 47 L. ed. 245. This rule of construction was adopted as early as 1808 in the case of one suing as a trustee. *Chappedelaine* v. *Dechenaux*, 4 Cranch. 306, 308, 2 L. ed. 627. It was adhered to in 1923 in the case of an executor. *Childress* v. *Emory*, 8 Wheat. 642, 5 L. ed. 705. In the following year Chief Justice MARSHALL said that it had never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal courts could not be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 856, 6 L. ed. 204. In 1870 in *Coal Co.* v. *Blatchford*, 11 Wall. [illegible], 20 L. ed. 179, the question was whether the jurisdiction of the federal court depended upon the citizenship of the trustees who were the plaintiffs, or of the parties for whose benefit the suit was averred to be brought. And Mr. Justice FIELD speaking for the court declared that, if the trustees were personally qualified by their citizenship to bring suit in the federal courts, jurisdiction would not be defeated by the fact that the parties whom they represent were disqualified. And see *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Bonnafee* v. *Williams*, 3 How. 574, 577, 11 L. ed. 732. The applicability of the rule does not depend upon whether title is or is not in the representative. While title is in executors, administrators, and trustees, it is not in the guardians or in receivers. It is not of controlling importance therefore in the decision of this

particular question that the committee was not under the law of New York invested with the title to the plaintiff's property.

"The rule under consideration is not, however, applied in all cases. In 1809, *Browne* v. *Strode*, 5 Cranch. 303, 3 L. ed. 108, a case was certified to the Supreme Court from a federal court in Virginia. The action was on a bond given by an executor in conformity to a Virginia statute, the bond being executed to the justices of the peace for the County of Stafford and for the faithful execution of the testators. The suit was brought in the federal court by citizens of Virginia against a citizen of the same state for the benefit of a British subject. The Supreme Court ordered it certified that the court below had jurisdiction. No reason was assigned, but the case is explained in *Irvine* v. *Lowry*, 14 Pet. 293, 300, 10 L. ed. 462, where it is said that the plaintiff was a mere nominal party, a mere instrument through whom the legal right of the real plaintiff could be asserted. In 1852, *Huff* v. *Hutchinson*, 14 How. 586, 14 L. ed. 553, a United States marshal, even after he has gone out of office, was held competent to sue, in a United States court, on an attachment bond, citizens of the state of which he himself was a citizen at the time; the bond having been given for the benefit of the plaintiffs in the original action who were citizens of another state. The Supreme Court held that the real plaintiffs were those for whose use the suit was brought and who were averred to be citizens of New York, and that it was immaterial that the marshal and the defendants were alike citizens of Wisconsin; the marshal's relation to the suit being merely nominal.

"So in 1844 in *McNutt* v. *Bland*, 2 How. 9, 11 L. ed. 159, the plaintiff was the Governor of Mississippi and the action was brought in his name in a federal court

in Mississippi against certain defendants who were also citizens of the same state. The action was brought for the benefit of persons who were citizens of New York. The law of Mississippi required a bond to be given by all sheriffs to the Governor for the faithful performance of their duty. The action was brought against the sheriff and his sureties on the bond. The court in holding that the suit might be maintained stated that the Governor was 'a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff.' And Mr. Justice BALDWIN writing for the court further said:

'It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the Governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. * * * In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instruments of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party. Both look to things not names—to the actors in controversies and suits not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.'

"These cases have not, to our knowledge, been overruled. The committee appointed in New York does

not come within the exception of *Browne* v. *Strode* and the cases allied with it. The substitution of the committee in the place of the plaintiff would have destroyed the diversity of citizenship necessary to the maintenance of the action. And under the circumstances then existing the action should have been dismissed—without prejudice. To have done so would not have deprived Chaloner of any constitutional right to have his cause of action determined in a federal court. It would simply have postponed his right to proceed therein until he had taken the necessary steps in the courts of the State of New York to have the orders adjudging him of unsound mind and incompetent, and appointing a committee of his person and property, vacated; his sanity having been restored."

While the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465, is by a lower court, the reasoning in the opinion is so clear that we cannot keep from quoting it.

In this case the court says:

"It is said that the beneficiaries under the statute are the real parties in interest, and that federal jurisdiction, based upon diverse citizenship, has relation to the citizenship of the real parties in interest, and not to that of mere nominal parties; that the plaintiff is a mere nominal party, and, for aught that appears in the petition, the other beneficiary may be a citizen of Ohio, and therefore, jurisdiction not appearing upon the face of the petition, the action must be dismissed. The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party, so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, where the party actively conducting the litigation is doing it in the name of the state, in the name of a next

friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who institutes it, carries it on, and, with the sanction of the court, may compromise or dismiss it. She has absolute control of, and is responsible for, the conduct of the case. *Harper* v. *Railroad Co.*, 36 Fed. 102; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Knapp* v. *Railroad Co.*, 20 Wall. 117; *Chappedelaine* v. *Dechenaux*, 4 Cranch. 306; *Childress* v. *Emory*, 8 Wheat. 642; *Clarke* v. *Mathewson*, 12 Pet. 164; *Bonnafee* v. *Williams*, 3 How. 574; *Osborn* v. *Bank*, 9 Wheat. 738; *Irvine* v. *Lowry*, 14 Pet. 298; *Rice* v. *Houston*, 13 Wall. 66; *Davis* v. *Gray*, 16 Wall. 220; *Florida* v. *Anderson*, 91 U. S. 676; *Waldren* v. *Skinner*, 101 U. S. 589; *Davies* v. *Lathrop*, 19 Fed. 353; *Shirk* v. *City of La Fayette*, 52 Fed. 857; *Reinach* v. *Railroad Co.*, 58 Fed. 33; *Morris* v. *Lindauer*, 4 C. C. A. 162, 54 Fed. 23; *Bangs* v. *Loveridge*, 60 Fed. 963; *Pennington* v. *Smith*, 24 C. C. A. 145, 78 Fed. 399. In the *Stewart case*, 168 U. S. 445, 18 Sup. Ct. 105, the question was whether a cause of action, arising in Maryland, could be sued upon in the District Court of Columbia, owing to the peculiarities of the Maryland statute requiring suits to be brought in the name of the state. It was not a question of federal jurisdiction, and the court held that, the State of Maryland not being the beneficiary of the fruits of the litigation, the suit might be brought in the District of Columbia by the personal representative of the deceased. The case is thus stated in the digest:

'An action for death caused by negligence in Maryland where the statute provides for an action in the name of the state as nominal plaintiff, but for the benefit of certain prescribed heirs, is not such a special remedy for a purely statutory right of action as will prevent the maintenance of an action by the administrator in the District of

Columbia, where the statutes provide for actions by personal representatives in such cases for the benefit of certain prescribed heirs, although the beneficiaries may not be exactly the same under the two statutes.' 4 L. Co-op. & S. Dig., p. 59.

"In suits by the state on relation of A. B., or by a next friend, the state and the next friend are not real parties, in the sense that they have an interest in the result of the litigation, nor in the sense that they control the litigation; but executors, administrators, trustees, etc., although they have no personal interest in the fruits of the litigation, yet are real parties in the sense that they control, and are responsible for, the litigation."

The Four Cases Filed and Dismissed.

The filing and dismissal of the four suits prior to the bringing of the present action has no bearing on the question involved in this case, because the dismissal was authorized by the code of the State of Oklahoma and was with consent of the court, and was not objected to by the defendants.

Sections 664 and 665 of the Comp. Okla. Stats. 1921, provide as follows:

"664. *Action Dismissed, When.* An action may be dismissed, without prejudice to a future action:

"*First.* By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court.

"*Second.* By the court, where the plaintiff fails to appear on the trial.

"*Third.* By the court, for the want of necessary parties.

"*Fourth.* By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

"*Fifth.* By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

"*Sixth.* In all other cases, upon the trial of the action, the decision must be upon the merits."

"665. *Dismissal Without Order of Court.* A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervener or defendant to proceed with the action. Any defendant or intervener may, in like manner, dismiss his actions against the plaintiff, without an order of court, at any time before the trial is begun, on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the District Court, the judge or clerk of the County Court, or the justice, where the action is pending, who shall note the fact on the proper record.' *Provided*, such dismissal shall be held to be without prejudice, unless the words 'with prejudice' be expressed therein."

Fraud and Collusion of the Widow and Her Counsel.

In discussing this proposition it is necessary to examine certain sections of the probate code of the State of Oklahoma, which are found in Compiled Oklahoma Statutes 1921.

Section 1079 defines the jurisdiction of the County or Probate Court, as follows:

"*Probate Jurisdiction of County Court.* The county court has probate jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

"*First.* To open and receive proof of last wills and testaments, and to admit them to proof, and to revoke the probate thereof, and to allow and record foreign wills.

"*Second.* To grant letters testamentary, of administration and of guardianship, and to revoke the same.

"*Third.* To appoint appraisers of estates of deceased persons.

"*Fourth.* To compel executors, administrators and guardians to render accounts.

"*Fifth.* To order the sale of property of estates, or belonging to minors.

"*Sixth.* To order the payment of debts due from estates.

"*Seventh.* To order and regulate all distribution of property or estates of deceased persons.

"*Eighth.* To compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate or of a minor.

"*Ninth.* To exercise all the powers conferred by this article or by other law.

"*Tenth.* To make such orders as may be necessary to the exercise of the powers conferred upon it.

"*Eleventh.* To appoint and remove guardians for infants, and for persons insane or otherwise incompetent; to compel payment and delivery by them of money or property belonging to their wards, to control their conduct and settle their accounts."

Section 1141 enumerates the parties entitled to be appointed administrator of a deceased person's estate, as follows:

"*Who Entitled to Letters of Administration.* Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

"*First.* The surviving husband or wife, or some competent person whom he or she may request to have appointed.

"*Second.* The children.

"*Third.* The father or mother.

"*Fourth.* The brothers.

"*Fifth.* The sisters.

"*Sixth.* The grandchildren.

"*Seventh.* The next of kin entitled to share in the distribution of the estate.

"*Eighth.* The creditors.

"*Ninth.* Any person legally competent.

"If the decedent was a member of a partnership at the time of his deceased, the surviving partner must in no case be appointed administrator of his estate."

Section 1153 provides for a waiver of a person entitled

to appointment in favor of some other person not entitled thereto, and reads as follows:

> "*Specific Waiver by Person Entitled.* Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits or depositions taken *ex parte* before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court."

Section 1159 sets out what a non-resident administrator must do before entering upon the performance of his duties, as follows:

> "*Non-resident Must Appoint Agent.* Every executor, administrator or guardian appointed in, but residing out of the state, shall, before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the County Court where such appointment is made."

Sections 1188 and 1189 show when a second administrator may be appointed when the first has become disqualified or has resigned, and are as follows:

"*New Administrators Appointed, When.* If all such executors or administrators die or become incapable, or the power and authority of all of them are revoked, the proper court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions as hereinbefore required of administrators, and shall have the like power and authority."

"*Resignation and Settlement.* Any executor or administrator may, at any time, by writing, filed in the County Court, resign his appointment, having first settled his account and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may at any time before the settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment or resignation."

Section 1197 defines the powers and duties of an executor or administrator, as follows:

"*Powers and Duties of Executors and Administrators.* The executor or administrator must take into his possession all the estate of the decedent, real and per-

sonal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the executors or administrators, is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purpose of administration, as provided in this chapter."

All of the foregoing provisions of the probate code of the State of Oklahoma were complied with in having the petitioner appointed administrator of the estate of said deceased, and the judgment is not subject to a collateral attack in this case.

In the case of *Wolfe v. Gilles, et al.*, 96 Okl. 6, 219 Pac. 350, the court said:

"Where, in a regular proceeding in a County Court of this state for the appointment of an administrator, an order appointing an administrator is entered, such appointment is a finding of every jurisdictional fact necessary to such appointment, and the order is not subject to collateral attack on the ground that the deceased was not a resident of the county where the appointment is made.

"Under section 1088, Comp. Stat. 1921, jurisdiction of the estate of a deceased citizen is based, not upon the existence of assets, but upon domicile in the county, and it is therefore not necessary that there should be assets of the decedent in order for an administrator to be appointed. While it would be an abuse of discretion for a County Court to appoint an administrator for a deceased resident of the county where there

is no estate, or other statutory ground for the appointment, such appointment would not be void.

"Where a judgment is entered in a court of general jurisdiction and the record is silent as to the existence of the facts that gave the court jurisdiction, it will be presumed that all the facts necessary for the proper rendition of the judgment have been found to exist before the judgment was rendered."

To the same effect is the case of *In re Green's Estate; Green v. Yearger*, 114 Okl. 283, 251 Pac. 1008.

The federal courts are in entire accord with the Supreme Court of Oklahoma in holding that an order and judgment of a probate court in appointing an administrator cannot be collaterally attacked.

In the case of *McGehee, et al.*, v. *McCarley*, 91 Fed. 462, the Circuit Court of Appeals for the Fifth Circuit said:

"The validity of the appointment of an administrator, made by a court of general probate jurisdiction, cannot be questioned collaterally in an action brought by such administrator to recover for the tortious killing of his decedent, it not appearing but that a judgment in the action would render the matters involved *res judicata*."

In the opinion it is said:

"The appointment of the administrator should not have been inquired into collaterally in this case. The court which appointed him had general probate jurisdiction. It has not been shown that a final determination in this cause, as between McCarley, suing as administrator, and the plaintiffs in error, would not be *res judicata*, and a complete protection against another suit for the same cause of action. This protection is all

the interest which the plaintiffs in error have in the point."

In the case of *Northwestern Mutual Life Insurance Co.* v. *Johnson*, 275 Fed. 757, the Circuit Court of Appeals for the Eighth Circuit said:

> "Since Iowa District Courts are courts of record with power to appoint administrators of the estates of deceased persons, their judgments in making such appointments are not subject to collateral attack."

To the same effect are the following:

Garrett v. *Boeing*, 68 Fed. 51;

McCants v. *Peninsula Land Co.*, 68 Fed. 66;

American Car & Fdry. Co. v. *Anderson*, 211 Fed. 301;

In re Agnew, 225 Fed. 650.

There is only one other case we will call to the attention of the court on this proposition.

In the case of *Smith* v. *Jennings*, 238 Fed. 48, the following is said:

> "Where temporary administrators were appointed by the court of ordinary of Georgia for the county in which the estate of decedent lay, the federal court cannot take jurisdiction of a bill involving the administration of the estate, on the theory that such temporary administrators were not officers of the court because of irregularities and fraud in their appointment, for, the court of ordinary being a court of competent jurisdiction, its appointment could not thus be collaterally attacked.

"Though administrators are acting under temporary letters, which might have been issued by the clerk, but were issued by the ordinary, they are nevertheless officers of the court of ordinary, and a contrary claim, as a basis for the federal court's taking jurisdiction of a suit involving the estate, cannot be supported.

"Where temporary administrators had given adequate bond, and additional temporary administrators, who were qualified to act, had been appointed, the right of the original temporary administrators cannot be questioned in a suit where it was sought to secure the appointment of a receiver by the federal court on the ground that such administrators had received their appointment through fraud and irregularities."

The appointment of petitioner as administrator of the estate of the deceased was made by the county judge of Pawnee County, State of Oklahoma, and he alone could make this appointment while discharging his duties as a sworn official of the State of Oklahoma.

It was the County Court's duty to make an independent investigation for himself as to the fitness of the petitioner to act as administrator, and then to determine whether or not his appointment was for the best interests of the estate.

It was a matter exclusively within his power, and upon that judge and him alone rested the duty to determine the reasons why the petitioner should or should not be appointed. He appointed the petitioner, who then became an officer of the court the same as a receiver appointed by a federal court is an officer of the court appointing him. Every presumption must be indulged in favor of the judgment.

The plaintiff was legally appointed administrator of the deceased's estate. He was appointed in pursuance of the statutory provisions of the State of Oklahoma hereinbefore set out by a court having competent jurisdiction to make the appointment, and the defendants have no right to complain in this case.

The widow and her counsel could do nothing about the appointment because the power rested on the county judge. Of course, the widow and her counsel had a right to suggest his name to the court and ask the court to make the appointment, but when the appointment was finally made it must be made by a judicial officer acting, not in his individual capacity, but in his official capacity.

This judgment of the County Court made in pursuance of the state statutes is entitled to as much consideration and respect as any judgment ever rendered by any other court.

United States District Courts are given exclusive jurisdiction in bankruptcy matters the same as County Courts of Oklahoma are given exclusive jurisdiction in probate matters, and in our opinion, a federal court has no more right to collaterally attack an order and judgment of the County Court of Oklahoma in a probate matter, than the County Court of Oklahoma would have to collaterally attack an order and judgment of the United States District Court in a bankruptcy matter. We can see no difference as both are courts of exclusive jurisdiction in the particular matters conferred upon them.

A comprehensive discussion of the question of fraud in the appointment of an administrator or guardian is set out in the opinion in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13.

In the opinion it is said:

"The appointment of a guardian is a matter wholly within the jurisdiction and control of the state court. A federal court has no authority to control the discretion of a state court in making such appointment, or designate who shall or who shall not be appointed as guardian. The probate court of Wayne County has jurisdiction, not only to appoint a guardian for this minor, but also the authority to determine for itself the reasons for the appointment. Blanchfield may have been under the impression that he was appointed for the purpose of bringing this action in the federal court, but the court that appointed him may have done so for wholly different reasons.

"The fact that an alien or a non-resident of the state, if appointed guardian, may bring an action in the federal court, is not necessarily a valid objection to his appointment. It is a matter that may be considered by the court making the appointment, in connection with the character and qualification of the persons appointed and the best interest of the ward. Nor is the fact that this minor, or her counsel representing her, desire to bring this action in federal court, and were in part influenced by this consideration to request the appointment of Blanchfield as guardian, of itself a sufficient reason for the dismissal of this suit on the ground of fraud or collusion."

The majority opinion practically admits that the only case cited on this proposition is not in point and we doubt

if one can be found; however, legal principles that are in point can be found, and in 1 C. J. 971, Par. 66, under title of actions, it is said:

> "If plaintiff shows a good and valid cause of action his motive in bringing the action is entirely immaterial, and cannot be inquired into; and it is no defense that he was actuated by improper motives, or malice, or a desire for revenge. These rules apply in equity as well as at law if the action is to enforce a clear equitable right."

The Circuit Court of Appeals for the First Circuit, in the case of *Johnson* v. *King-Richardson*, 36 Fed. (2d) 675, approves the foregoing statement, and says:

> "'Where suitor is entitled to relief in respect to matter concerning which he sues, his motives are immaterial, and legal pursuit of his rights, no matter what his motive in bringing action, cannot be deemed either illegal or inequitable, and he may always insist upon his strict rights and demand their enforcement."

This court has frequently held that the joining of a defendant of the same residence and citizenship as the plaintiff in a suit is not fraudulent whatever the motive may be, if by the state law he has a joint liability.

—*Ill. Cent. Ry. Co.* v. *Sheegog*, 215 U. S. 308, 30 Sup. Ct. Rep. 101, 54 L. ed. 208;

Chicago, B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521.

A late case decided by this court, that of *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 48 Sup. Ct. Rep. 404, 276 U. S. 518, is more

nearly in point than any case that we have been able to find which determines the proposition in our opinion.

The first and second paragraphs of the syllabus of this case are as follows:

"Where, in action by taxicab company to prevent interference with carrying out of contract with railroad brought in federal court, in Kentucky, requisite diversity of citizenship existed, and controversy was real and substantial, court, in determining jurisdiction, will not inquire into motives of plaintiff in reincorporating in Tennessee for purpose of suing in federal court.

"Co-operation between railroad and taxicab company to have rights of parties to contract between them determined by federal court by having latter reincorporate in another state for purpose of suing in federal court, *held* not improper or 'collusive,' within meaning of Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80)."

In the opinion it is said:

"Section 37 of the Judicial Code (28 U. S. C. A., Sec. 80) requires any suit commenced in a District Court to be dismissed, if it shall appear that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in such court. The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid, and claims to be entitled, without the consent of the railroad company, to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights it granted. The mo-

tives which induced the creation of respondent to become successor of its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. *McDonald* v. *Smalley, et al.*, 1 Pet. 620, 624, 7 L. ed. 287. It is enough that respondent is the real party in interest. *Smith, et al.*, v. *Kernochen*, 7 How. 198, 216, 12 L. ed. 666. The incorporation of respondent or its title to the business and contract in question is not impeached.

"Co-operation between it and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of section 37. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110, 28 S. Ct. 219, 52 L. ed. 403; *Harkin* v. *Brundage*, February 20, 1928, 276 U. S. 36, 48 S. Ct. 268, 72 L. ed. 457; *South Dakota* v. *North Carolina*, 192 U. S. 286, 311, 24 S. Ct. 269, 48 L. ed. 448. It requires no discussion to distinguish *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444, and *Miller & Lux* v. *East Side Canal Co.*, 211 U. S. 293, 29 S. Ct. 111, 53 L. ed. 189. The District Court had jurisdiction."

Petitioner was actually appointed administrator of the estate of Archie Lee Smith, deceased, by the honorable County Court of Pawnee County, State of Oklahoma, the court having jurisdiction to make the appointment. The appointment was not feigned or merely colorable, but real, and under these circumstances the federal court has no right to inquire into the motive concerning said appoint-

ment. There is absolutely no distinction between the last cited case and the case at bar.

Conclusion.

We respectfully submit that had the deceased died leaving a will naming petitioner as executor and the will had been probated; and petitioner named executor of the estate of said deceased and this suit been filed under those circumstances and was being presented to this court, that the identical question would then be involved that is involved in this appeal. This, to our mind, shows that the alleged wrongful conduct of the widow and her counsel, complained of in this case, is entirely foreign to the legal question involved.

We believe that the law as applied to the record in this case is about as follows:

(1) That under the Oklahoma statutes cited herein in determining the jurisdiction of a United States District Court on the ground of diversity of citizenship where an administrator is a party to the record, that the administrator's residence and citizenship should govern in place and instead of that of the beneficiaries or next of kin.

(2) That a litigant by exercising a right given him under a state law cannot be guilty of fraud upon a federal court although the litigant exercises such right with the express purpose and intent of avoiding the jurisdiction of a federal court on removal.

We respectfully submit that this cause should be reversed with instructions that it be remanded to the state court, from whence it was wrongfully removed to the federal court.

Respectfully submitted,

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